

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: MDL Docket No 06-1791 VRW
NATIONAL SECURITY AGENCY ORDER
TELECOMMUNICATIONS RECORDS
LITIGATION

This order pertains to:

Al-Haramain Islamic Foundation et
al v Bush et al (C-07-0109 VRW),
_____/

On January 5, 2009, the court ruled on cross-motions in this action, denying the United States government defendants' third motion to dismiss (Doc #475/49¹) and granting plaintiffs' motion for discovery pursuant to 50 USC § 1806(f) (Doc #472/46). Doc #537/57 at 22.

The January 5 order also set forth orders designed to make it possible for the court to determine whether plaintiffs had been subject to unlawful electronic surveillance and to enter an order under seal regarding the outcome of that determination. The order provided for plaintiffs' counsel to obtain top

¹ Documents will cited both to the MDL docket number (No M 06-1791) and to the individual docket number (No C 07-0109) in the following format: Doc #xxx/yy.

1 secret/sensitive compartmented information (TS/SCI) security
2 clearances and ordered the government to review its classified
3 submissions in this case and determine whether any could be
4 declassified. Id at 22-25. At the January 23 case management
5 conference herein, the court stated:

6 I have no intention of reviewing the sealed
7 document [containing classified information] until
8 we get all of these pieces in place so that we can
9 proceed in a judicial fashion; and by that I mean a
10 fashion in which both parties have access to the
11 material upon which the court makes a decision.

12 RT (Doc #532) at 34.

13 The January 5 order noted in detail the manner in which
14 defendants had declined "fully [to] engage with plaintiffs' [§
15 1806(f)] motion, but rather seem[ed] to hold themselves aloof from
16 it" while continuing to assert legal positions already specifically
17 rejected by the court in previous orders. Doc #537/57 at 20-22.

18 Defendants next filed a notice of appeal and moved the
19 court for an order certifying the January 5 order for an
20 interlocutory appeal. The court denied the motion and ordered
21 defendants to inform the court by February 27, 2009 how they
22 intended to comply with the January 5 order. Doc #562/71. The
23 court of appeals dismissed defendants' appeal and agreed with this
24 court that an interlocutory appeal was not appropriate. Al-
25 Haramain Islamic Foundation, Inc v Obama, No 09-15266 (9th Cir
26 February 27, 2009). Defendants, in response, presented to the
27 court "three similar-sounding alternatives all of which appear[ed]
28 geared toward obtaining a stay of this court's proceedings and
review by the court of appeals." Doc #600/84 at 1-2.

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1 The court next ordered the parties to meet and confer
2 regarding the entry of an appropriate protective order and to
3 submit such an order to the court. Id at 2. The parties filed
4 their joint submission on May 15, 2009. Doc #626/89.

5 As the court understands the situation:

6 1. The United States has completed suitability
7 determinations for two of plaintiffs' attorneys and found them
8 suitable for TS/SCI clearances, but government officials in one or
9 more defendant agencies, including the NSA Director (Doc #626/89 at
10 16), are refusing to cooperate with the court's orders because,
11 they assert, plaintiffs' attorneys do not "need to know" the
12 information that the court has determined they do need to know.

13 2. Defendants have refused to agree to any terms of the
14 protective order proposed by plaintiffs and have refused to propose
15 one of their own. Doc #626/89 at 35.

16 Defendants are now ordered to show cause why, as a
17 sanction for failing to obey the court's orders:

18 (1) defendants should not be prohibited, under FRCP
19 37(b)(2)(ii), from opposing the liability component of plaintiffs'
20 claim under 50 USC § 1810 — that is, from denying that plaintiffs
21 are "aggrieved persons" who were subjected to electronic
22 surveillance; and

23 (2) the court should not deem liability under 50 USC §
24 1810 established and proceed to determine the amount of damages to
25 be awarded to plaintiffs.

26 Defendants shall submit written response to this order no
27 later than May 29, 2009.

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1 Plaintiffs shall, no later than May 29, 2009, submit a
2 memorandum addressing whether it would now be appropriate and/or
3 feasible for plaintiffs to file a motion for summary judgment on
4 their claim under 50 USC § 1810. Plaintiffs should address the
5 merits of filing such a motion under two scenarios: (1) with a
6 protective order in place allowing plaintiffs' counsel access to
7 the Sealed Document; and (2) with no such protective order and no
8 such access.

9 Counsel for the parties shall appear for a hearing on
10 these questions June 3, 2009 at 2:00 pm in Courtroom 6.

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12 IT IS SO ORDERED.

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16 VAUGHN R WALKER
17 United States District Chief Judge
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